No. 22,417

ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C & C PACKING COMPANY,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against C & C Packing Company on March 29, 1967. The Board's

decision and order (R. 20-27, 44-45),[1] are reported at 163 NLRB No. 90. This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in Phoenix, Arizona, where respondent is engaged in the processing, sale, distribution and packing of meat and meat products. There is no issue as to the Board's jurisdiction.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union[2] after the Union had established its majority status by a card check. The facts upon which the Board based its findings may be summarized as follows:

During March and early April, 1966, Austin Allen, secretary-treasurer of Local 448 and International Representative Harold Benninger signed up 15 employees in a production and

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[1] References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume I, Pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Exh." refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Union involved is Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 448, AFL-CIO.

maintenance unit of 22 eligibles at respondent's plant (R. 22; Tr. 31, 102). Many of the employees are Spanish-speaking; hence, the union representatives took with them to employee homes one Pete Garcia, a Spanish-speaking member of the Union from another plant who, when necessary, read the language of the cards to employees in both English and in Spanish (Tr. 32-38, 102-119). By March 26, having acquired 11 cards or well over the 30 percent required for an election, the Union filed a representation petition with the Board's Regional Office in Phoenix (R. 21; Tr. 120).

On April 7, Board Agent Deeny called a meeting of union and company representatives for purposes of processing the petition. Attending were Union Representatives Allen and Benninger along with respondent's attorneys, Lawrence Pavilack and John Gigounas. David Crockett, respondent's secretary-treasurer, also attended (R. 21; Tr. 43-44). Deeny broached the possibility of a consent election conducted by the Board, whereupon Pavilack said he would like to talk to the Union privately (R. 21; Tr. 45-47). Deeny absented himself and Pavilack then commented that he considered Allen "fair"[3] and then asked if the Union would withdraw its representation petition if it could prove it had 51 percent of the employees (R. 21; Tr. 47). Somewhat surprised, Allen said that, contingent on approval by his superiors, he would set up a card check and let Pavilack know (Tr. 48).

On April 12, Allen called Pavilack, told him the Union had withdrawn its petition and suggested April 12 for the card check (R. 21; Tr. 49). Pavilack agreed but set the date at April 14 so David Crockett could attend (Tr. 49,203). Allen then called the Board and asked it to run the card check. The Board agent refused, but suggested the Federal Mediation and Conciliation

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[3] Allen has been secretary-treasurer of the local in Phoenix for 10 years (Tr. 31).

Service. The Service suggested William Halloran, a retired mediator, who agreed to serve on April 14 (R. 22; Tr. 9).

The April 14 meeting began at Pavilack's office. It was attended by Allen and Benninger, the two union representatives, Pavilack and Gigounas, respondent's attorneys, and respondent's secretary-treasurer, David Crockett (Tr. 124). Pavilack opened the meeting by asking if the Union had brought a contract proposal. Allen said "no," that he had anticipated only a card check but that he would be ready with a contract in a week (R. 22; Tr. 50).

The meeting then adjourned to the Federal Mediation Service offices where Pavilack produced a typed list of employees and Allen handed Halloran the 15 cards mentioned above. Halloran first asked if there were any "problems or challenges" (Tr. 10-11, 248). Assured by both sides that there were none, he then twice checked the names on the cards against the typed list, announced the result as 15 of 22 for the Union, placed both cards and list in an envelope, sealed it with tape, wrote his name across it and gave it to the union representatives for delivery to the Board's office (R. 22, G.C. Exh. 2, Tr. 13). The Company did not ask to see the cards (Tr. 25). Nor did it assert any reservations respecting whether it would bargain as a result of the card check (Tr. 26).

As the parties left the room, Allen agreed with Pavilack that a meeting would be held at 1:30 p.m., Tuesday, April 19, at Pavilack's office (R. 22; Tr. 60). A day or so later Allen got a letter from Pavilack dated April 14 asking for a draft contract to "give us an opportunity to review it to determine the matters that are in agreement and those that we must discuss" (R. 22; Tr. 61, G.C. Exh. 18).

On Monday, April 18, Allen and Benninger drafted a contract proposal and hand-delivered two copies with an accompanying letter to Pavilack's office (R. 22; Tr. 66). On April 19, however, Allen received the following letter from Pavilack:

I have just been informed by our client, C. and C. Packing Company that they desire to have an election to determine whether or not the majority of the employees want to be represented by the Union prior to entering into any negotiations regarding the proposed contract. Mr. M.L. Crockett, President of C. and C. Packing Company, stated that some employees requested him to have an election as they felt that the majority of the employees did not want to be represented by the Union and, therefore, he felt that in order to be fair to all of the employees, an election should be held.

I realize this letter may take you by surprise, but I am just expressing my client's desires and feel that this would probably be fair in light of the fact that some of the employees do not want to be represented by the Union. This would clarify any doubt any of the employees would have in their minds as to whether or not the majority of the employees want to be represented by the Union.

I am in receipt of your proposed contract but I have not opened it in light of the fact that we now desire to have an election prior to entering into negotiations.

We feel this decision should not affect our negotiations and entering into a contract should the employees elect your Union. In order to satisfy all of C. and C. Packing Company's employees, it is felt that an election would be in the best interests of all.

I am sure you understand our position and, therefore, hope that we can arrange for the election at the earliest possible date so that we can begin negotiations on a contract, assuming that the majority of the employees desire to be represented by the Union. I think this would be in the best interests of all.

> Our meeting set for April 19, 1966 should, therefore, be cancelled. I will be pleased to meet with you and Mr. Deeney [sic] at your convenience for the purpose of amicably working out details of the election.
>
> If you have any questions regarding this matter, please do not hesitate to call or write.

Forty-five minutes after Allen opened the letter, respondent's attorney Gigounas telephoned him to ask whether he had received the letter (R. 23; Tr. 69). Allen said he had but insisted the Company bargain on the basis of the card check; Gigounas said he would check and call back but he did not call. The Union accordingly filed the charge herein on April 27 (R. 20; G.C. Exh. 22, Tr. 69-71).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after the Union had established its majority by a card check (R. 27, 45).

The Board ordered respondent to cease and desist from the unfair labor practices found, to bargain with the Union on request, and to post the usual notices (R. 27, 45).

ARGUMENT

THE BOARD PROPERLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE MAJORITY REPRESENTATIVE OF ITS EMPLOYEES, AFTER REQUESTING A CARD CHECK AND AGREEING TO BE BOUND BY ITS RESULTS

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." That section provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . ." Although under Section 9(c)(1) the Board conducts elections to determine representative status, it has long been settled that such status may be shown by other means. See, *United Mine Workers v. Arkansas Oak Flooring Co.,* 351 U. S. 62, 71-72. Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he insists on an election and refuses to recognize and bargain with the union, unless such refusal is motivated by a good faith doubt of the union's majority status. *Retail Clerks Union, Local 1179 v. N.L.R.B.*, 376 F.2d 186, 190 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 726-727 (C.A.9); *N.L.R.B. v. Hyde,* 339 F.2d 568, 570 (C.A. 9); *Snow v. N.L.R.B.*, 308 F.2d 687, 691, 694 (C.A. 9); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209-210 (C.A. 9); *Joy Silk Mills v. N.L.R.B.,* 185 F.2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914. As we show below, the record in this case shows with unmistakable clarity that respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority and was, therefore, unlawful.

As shown in the Statement, the union organizers, accompanied by a Spanish-speaking employee from another plant, visited respondent's employees, some of whom are Mexican-Americans, in their homes, explained the purpose of the union cards and signed up 15 of the 22 eligibles between mid-March and early April 1966. The Union filed an election petition with the Board on March 26. However, when the parties met on April 7 to work out details of a possible consent election agreement, respondent asked if the Union would withdraw its petition if a majority could be proved. Taken somewhat by surprise, the union representatives asked for time. Their superiors approved the Company's suggestion, however, and the Union withdrew the petition, told respondent on April 12 it had done so and was ready for the card check. Respondent suggested April 14. The Union accordingly engaged Mediator Halloran and met with respondent as scheduled.

As the meeting with Halloran began, the Union's cards were in the possession of Organizer Allen and respondent in turn had a typed list of the 22 persons in the appropriate unit. Halloran counted the cards, examined the signatures, compared the names with those on the list and announced the result as 15 of 22 for the Union. Respondent and the Union agreed to meet April 19 to begin negotiations and on April 15 respondent wrote the Union for its contract proposal to make the April 19 meeting more productive. The Union hand-delivered a draft to respondent on April 18. Early the next day, the Union got a special delivery letter stating respondent's "desire to have an election" because "some of the employees do not want to be represented by the Union" (G.C.Exh. 21). Respondent called to see whether the Union had received its letter. Allen said he had, that he stood on the results of the card check and that he wanted to negotiate right away. Respondent has never responded to this request.

The record shows that on the occasion of the card check on April 14, none of respondent's three representatives who were present expressed the slightest reservation about the propriety of the card count made by Mediator Halloran, nor was any doubt raised that the Union in fact had a majority. Equally noteworthy was respondent's letter received by the Union on April 19 which expressed no doubt concerning the Union's majority; nor was any claim made in the letter that the card count was invalid or that the cards had been improperly obtained from the employees. This case is virtually indistinguishable, therefore, from *Snow v. N.L.R.B., supra,* where the employer also agreed to a check of union authorization cards by a neutral person and subsequently rejected the results of the check and insisted on an election. There, as here, the employer having been presented with strong, if not conclusive, evidence of the union's majority failed completely to show that his subsequent refusal to bargain was based on a good faith doubt of that majority. Also see *Retail Clerks Union, Local 1179 v. N.L.R.B., supra.*

Before the Board, respondent contended that by taking part in the card check, it did not forfeit its "right" to a Board election. It is well settled, however, that "an employer has no absolute right to demand an election" but must bargain with the designated representative of his employees in the absence of a good faith doubt of its majority status. *N.L.R.B. v. Hyde, supra,* 339 F.2d at 570, n.1. This contention by respondent is further unavailing, because it rests on the discredited testimony of one of respondent's counsel that the other counsel stated at the April 14 check that, "This is not to impair either parties' rights to request an election until there is actually recognition of the Union by valid means" (Tr. 198). This evidence was rebutted by the credited testimony of two of General Counsel's witnesses, Mediator Halloran and Union Organizer Allen. Halloran testified that no statement was made that the card check was not to be used to determine majority representation (Tr. 26). Allen was even more explicit; he testified "I

would be out of my mind" (to agree to a reserved right to a Board election after a card check). "It would cost me my job" (Tr. 95). The Trial Examiner credited Halloran and Allen and went into detail as to why he discredited respondent's version of what transpired (R. 23-26). Respondent has shown no reason for overturning these credibility determinations and they warrant affirmance by this Court. See *Shattuck Denn Mining Corp v. N.L.R.B.*, 362 F.2d 466, 469 (C.A. 9); *N.L.R.B. v. Carpenters Local No. 2133*, 356 F.2d 464, 466 (C.A. 9).

Before the Board respondent also attempted to challenge the Union's majority on the basis of interrogation of employees which it conducted two days before the start of the Board hearing. Respondent sought to show that because certain of the employees principally spoke Spanish they did not understand the meaning of the union cards. The Trial Examiner, however, credited the testimony of Union Representatives Benninger and Allen and concluded that "partially through the use of an interpreter the employees knew full well the meaning of the authorization cards they were signing." (R. 24).

Respondent also tried to show that employees were induced to sign cards for the Union on the misrepresentation that their only purpose was to secure an election. [4] Respondent relied,

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[4] The language of the cards is unambiguous and contains no reference to a Board election. It is as follows (G.C.Exh. 4-17):

AUTHORIZATION FOR REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT

I hereby authorize the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, to represent me and bargain collectively with my employer in my behalf, to negotiate and conclude all agreements concerning wages, hours and all other conditions of employment. (Cont'd on p. 11)

for this purpose, on the testimony of five witnesses, two of whom, Alvarado and Walker, did not remember that the union representatives, Benninger and Allen, had said anything about an election (Tr. 179, 193). Leyba and Nunez both testified that they were told that there would be an election, but neither testified as to any representation by the union agents concerning the use to which the card would be put.[5] The only employee who testified that the union representative had told him that signing the card would enable an election to be held was Sanchez. However, Sanchez did not testify that this was the *only* reason that he was asked to sign the card. Under the Board's established test for determining whether there has been such misrepresentation as to invalidate a card, it is necessary to establish that the union solicitor indicate to the signer that the card would be used *only* for a Board election; it is not enough to show that he discussed the possibility of an election and that the cards might also be used for that purpose. *Cumberland Shoe Corp.*, 144

(Cont'd from p. 10)

> I hereby revoke and rescind any power and authority heretofore executed by me, and declare that this authorization supersedes any other which I may previously have given to any person or organization to represent me for the purposes above set forth. This authorization shall remain in full force and effect for one year from date hereof.

A single card, signed by Roberto Salinas, contains somewhat different, but similarly unambiguous language. (G.C. Exh 3).

[5] Since the Union filed an election petition on March 26, a few days after most of the employees were signed up, it would not be surprising if an election was mentioned while efforts were made to get the employees to sign cards. In any event, since respondent induced the Union to withdraw its election petition and offered recognition if the Union could prove its majority through a card check, respondent is hardly in a position to challenge the majority on the ground that representations concerning an election were made at the time the Union obtained its cards.

NLRB 1268, enforced, 351 F.2d 917 (C.A. 6). Accord: *Aero Corp.*, 149 NLRB 1283, 1289-1290, enforced, 363 F.2d 702 (C.A.D.C.), cert. denied, 385 U. S. 973; *United Automobile Workers v. N.L.R.B.*, No.20,137, November 14, 1967, 66 LRRM 2548, 2552-2553 (C.A.D.C.); *N.L.R.B. v. Southbridge Sheet Metal Works*, 380 F.2d 851, 855-856 (C.A. 1). See also, *NLRB v. Hyde, supra*, 339 F.2d at 570-571 (C.A. 9). Accordingly, respondent's challenge to the validity of Sanchez' card is unavailing. In any event, since the Union had cards from 15 of the 22 employees in the unit, it's majority did not turn on the validity of Sanchez' card.

In sum, as aptly stated by the Trial Examiner: "It does not require more than a comment that the evidence offered by Respondent is inadequate to impeach the union authorization cards signed by Respondent's five witnesses" (R.25). Plainly, the five cards were properly considered by the Board in finding that the Union had a majority. See, *N.L.R.B. v. Security Plating Co., supra*, 356 F.2d at 726-727 (C.A. 9); *N.L.R.B. v. Mutual Industries, Inc.*, 382 F.2d 988, 989 (C.A. 9). Accordingly, respondent's duty to bargain arose at the August 14 card check when it observed and did not question the Union's majority. As recently pointed out by the Seventh Circuit *(N.L.R.B. v. Richman Brothers Co.*, No. 16,159, decided December 13, 1967, 67 LRRM 2051, 2054):

> When all genuine doubt of the union's majority status in an appropriate unit has been erased, the employer's duty to bargain collectively becomes fixed. The employer may not evade that duty by marking time until the union's majority is lost through its own efforts [citing *N.L.R.B. v. Mid-West Towel & Linen Service, Inc.*, 7 Cir. 339 F.2d 958 (1964); *N.L.R.B. v. Philamon Laboratories, Inc.* 2 Cir., 298 F. 2d 176, cert. den., 370 U. S. 919 (1962); *Joy Silk Mills, supra*], or through forces for which it is not accountable [citing *Retail Clerks Union, Local 1179*

(John W. Serpa) v. N.L.R.B., supra, (C.A. 9), and *Snow v. N.L.R.B., supra* (C.A. 9)].

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board's order be enforced.

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Assistant General Counsel,
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Attorneys,
National Labor Relations Board.

March 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

APPENDIX B

Pursuant to Rule 18(2) (F) of the Rules of the Court (Numbers are to pages of the Reporter's Transcript).

Exhibit No.	Identified	Offered	Received in Evidence
General Counsel's			
1 (a) through 1 (o)	7	7	7
2	13	14	15
3	33	34	34
4	35	38	38
5	39	105	105
6	39	107	110
7	39	109	110
8	39	110	112
9	39	112	117
10	39	119	120
11	39	119	120
12	39	119	120
13	39	119	120
14	39	119	120
15	39	119	120
16	39	119	120
17	55	119	120
18	60	61	61

Exhibit No.	Identified	Offered	Received in Evidence
19	63		not offered
20	65	66	66
20 (a)	65	66	66
20 (b)	65		not offered
21	67	68	68
21 (a)	67	68	68
22	70	71	71
22 (a)	70	71	71
Respondent's			
1	144		rejected
2	155		rejected
3	155		rejected
4	155		rejected
5	155		rejected
6	155		rejected
7	155		rejected
8	164		rejected
9	164		rejected
10	164		rejected
11	164		rejected
12	164		rejected
13	164		rejected
14	164		rejected
15	164		rejected
16	164		rejected